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No. 559

In the

Supreme Court of the United States

October Term, 1959

National Labor Relations Board,
Petitioner,

v.

Pittsburgh Plate Glass Company,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 270 F. (2d) 167 and is set forth at pp. 16-31 of the appendix to the petition for certiorari ("Pet.") herein. Two decisions of the National Labor Relations Board are involved: 1. The decision and order of the Board in Case No. 5-CA-1208, reported at 121 NLRB 758 (B.A.[1] 14-17), hereinafter called the unfair labor practice case; and 2. The decision and direction of election of the Board in

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[1] "B.A." and "C.A." references are to the Board's and Respondent's appendices, respectively, filed in the Court of Appeals. Nine copies of such appendices have been filed with the clerk of this Court pursuant to Rule 21(4).

Case No. 5-RC-2088, reported at 117 NLRB 1728 (B.A. 21-27), hereinafter called the representation case.

JURISDICTION

The jurisdictional requisites are appropriately set forth in the Petition.

QUESTIONS PRESENTED

The questions presented are:

1. Whether the Court of Appeals correctly denied enforcement to an order of the National Labor Relations Board directing Respondent, a plate glass manufacturer, to bargain with a craft unit of twenty-three workers, the Board having previously refused, and continuing to refuse, to create such a craft unit in four other industries where integration of operations and history of collective bargaining—the factors upon which the Board relied to deny a craft unit in such other industries—are substantially identical with such factors in the plate glass industry.[2]

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[2] In its *National Tube* decision, 76 NLRB 1199, decided April 7, 1948, the Board held that in the basic steel industry, because of integration of operations and long history of plant-wide bargaining, no craft unit would be allowed. Subsequently the Board included within its ruling three other integrated industries—basic aluminum, lumber and wet milling (Pet., p. 20). But in *American Potash*, 107 NLRB 1418, decided March 1, 1954, the Board held that in all other industries, despite integration of operations and long history of plant-wide bargaining, craft units would be allowed and it applied that doctrine in the instant case. However, the Board continues to disallow craft units in the aforementioned four industries, while permitting them in all other industries despite identity of integration and history of collective bargaining.

2. Whether Respondent was entitled, during the course of the unfair labor practice case, to show that the interested union was not in compliance with Section 9(h) of the Act (which at that time required the filing of certain non-communist affidavits) and thereby to establish the Board's want of jurisdiction. The Court below did not find it necessary to decide this question since it denied enforcement to the Board's order on the ground that the Board's craft unit determination was arbitrary and discriminatory.

STATUTORY PROVISIONS INVOLVED

This case arises under the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. Sec. 151 *et seq.* Pertinent provisions of the Act are set forth in the appendix hereto (pp. 17-19).

STATEMENT OF THE CASE

There are facts in the case in addition to those set forth in the petition for certiorari which should be brought to the Court's attention.

(a) Facts As To Manufacture Of Plate Glass and History Of Collective Bargaining In Plate Glass Plants.

The Court below correctly found (Pet., pp. 16, 29) that the operations of Respondent's plate glass plant are highly integrated—indeed more integrated than those in the four industries (steel, aluminum, lumber and wet milling) selected by the Board for special treatment. In those industries the Board does not allow craft units. In the plate glass industry where integration is identical with, or greater than, integration in the selected industries, and where the history of plantwide bargaining is even longer than in the selected industries, the Board seeks to require a craft unit (Pet., p. 29).

The record establishes these facts and they are conceded by the Board. Thus, as to integration of operations the record shows that sand, soda ash and limestone are the principal raw materials in glass making. These materials are automatically weighed and mixed in a batch house; automatically conveyed to a tank furnace; and automatically fed to the furnace, which is a refractory lined structure, 30 feet wide and 150 feet long, holding a depth of four feet of molten glass (C.A. 3-9). The batch materials are melted and refined in the furnace continuously and without interruption 24 hours a day, seven days a week for varying periods of three or more years, depending upon the life of the refractories (C.A. 10, 16, 17). At the outlet lip of the tank, the molten glass has sufficient viscosity to be drawn horizontally between forming rolls that impart relatively uniform thickness and width to a ribbon of glass, which cools and anneals as it passes through a long oven called a lehr (C.A. 10, 11-12). Still a continuous ribbon, the glass is ground simultaneously on the upper and lower surfaces to impart parallelism and is then polished to provide its ultimate transparency (C.A. 19-21).

In Respondent's plant, as in all plate glass plants, the technology is heavy, highly mechanized, and continuous. No hand need touch the glass from the moment the batch materials enter the furnace until the moment the glass is cut into customers' sizes and boxed for shipment. The total distance between the initial formation of the ribbon of glass and the point at which it is cut into customers' sizes is approximately one-third of a mile. The production line is one continuity (C.A. 25 and Co's Exh. 1, C.A. 121).[3]

[3] The record contains other convincing evidence of the integrated and continuous nature of Respondent's process of making plate glass particularly as related to the employees in the unit here involved (C.A. 12-14, 16, 18, 19-23, 31-60, 69-86, 89-100, 104-107, 112-115; B.A. 51-52, 55).

Plate glass production is much more integrated than steel production, which is merely a process of tapping and filling (C.A. 65, 66). Shutting down a blast furnace in steel for several hours or even a full day is not critical (C.A. 59-60). The furnace is often banked and can be started again in a few hours without damage (C.A. 63-64). However, in plate glass production even a few minutes interruption in the glass tank, as through an electrical failure, creates serious difficulties and may result in shutting the tank for several months (C.A. 9, 59-61, 67-68). The reason is that even a slight cooling of the tank may cause its walls to contract and possibly cave in. The whole tank can be lost (C.A. 51, 63). Briefly put, a breakdown of equipment in steel merely means loss of production, while in plate glass it presents the risk of loss of capital equipment.

For 25 years Respondent has bargained with the United Glass and Ceramic Workers of North America, AFL-CIO ("Glass Workers") as the collective bargaining representative of all of its employees, including electricians, in its plate glass plants (C.A. 32-34, 108, 112). In all of that time Respondent has operated three plate glass plants located respectively at Creighton and Ford City, Pennsylvania and at Crystal City, Missouri (B.A. 23, note 5).[4] There has never been a craft unit at any of these plate glass plants; nor has there ever been a craft unit in any plate glass plant in the entire plate glass industry in the United States (C.A. 32-34, 108).

In 1939 the Board certified the Glass Workers as the collective bargaining representative of all production and maintenance employees in Respondent's plate glass plants. *Pittsburgh Plate Glass Co.*, 10 NLRB 1111. This unit determination was reviewed and sustained by the Court in *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U.S. 146, where the Court rejected a contention that one whole plate glass

[4] In 1956 the plant involved here was put into operation at Cumberland, Maryland (B.A. 22).

plant of Respondent should be set up as a separate unit, holding that this would frustrate division-wide effort at labor adjustments. 313 U.S. at 164. This forms a striking contrast to what the Board seeks to do here in establishing as a separate unit a tiny craft segment of a highly integrated plant, contrary to twenty-five years of plant-wide collective bargaining in the plate glass industry.

(b) Facts As To Charging Union's Non-Compliance With Section 9(h)[5] Of The Act.

In both the representation and unfair labor practice cases, Respondent sought to show that a particular individual was an officer of Local 307 of the International Brotherhood of Electrical Workers ("Electrical Workers"), the charging union herein, and that he had not filed the non-communist affidavit required by Sec. 9(h) of the Act (B.A. 15 (note 3), 18-21, 22 (note 4); C.A. 117-119, 122-123). As found by the Board, Local 307 assisted in the organization of the employees in the certified unit at Respondent's plant (B.A. 2, 15, 22 (note 4)), and admits them into membership (B.A. 2, 15; C.A. 100-101). Furthermore, it intends to serve them if the Board's certification is upheld (B.A. 61). At all times, Respondent was precluded from litigating its contention respecting the non-compliance of Local 307 (B.A. 2, 3, 15 (note 3), 19; C.A. 118, 122) and the Board admitted as much in its brief below. The record is thus uncontradicted that an officer of Local 307 did not in fact file the affidavit re-

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[5] Effective Sept. 14, 1959, Sec. 9(h) was repealed by Sec. 201(d) of the Labor-Management Reporting and Disclosure Act of 1959, Public Law 86-257, 86th Cong. Such repeal was not made retroactive. Accordingly, since the events upon which Respondent relies occurred before the repeal of Sec. 9(h) and show a clear violation of that section, Respondent may rely upon them to establish the Board's want of jurisdiction herein. *Du-Wel Decorative Co.*, 125 NLRB No. 5 (November 9, 1959); *Danville Silk Co.*, 45 LRRM 1128 (November 27, 1959).

quired by Sec. 9(h) of the Act (B.A. 18-21; C.A. 117-119, 122-123).

(c) Decision Of The Court Of Appeals.

The Court of Appeals refused to enforce the Board's order, holding that the Board's action in issuing the order was arbitrary and discriminatory. This arbitrary and discriminatory action occurred when the Board automatically applied in this case its rule laid down in *American Potash & Chemical Corp.*, 107 NLRB 1418 that, except in the four selected industries (steel, aluminum, lumber and wet milling), it would allow craft units no matter how integrated the operations and no matter what the pattern and history of collective bargaining in the plant or industry (Pet., p. 24). The Court of Appeals said below:

> "Instead of selecting an appropriate bargaining union (*sic*) after a study of the circumstances of the case before it, it followed its announced policy of acceding to the wishes of a small group of employees, comprising a craft, for separate representation, although potent reasons existed for the plantwide representation desired by the employers and the great majority of the workers. Conceivably such a decision could be justified by the circumstances of a given case, but in this instance it must be condemned as discriminatory, in view of the conflicting policy and action of the Board in denying craft representation and directing plantwide representation under precisely similar circumstances in certain selected fields." (Pet., pp. 28-29)

The Court of Appeals added that there was no reasonable explanation for the discrimination. The same conditions existed in the plate glass industry as caused the Board to deny craft units in the four selected industries (steel, aluminum, lumber and wet milling), namely, integration of operations and long history of plant-wide bargaining (Pet., pp. 29-30). The Court of Appeals said:

> "This discrimination in favor of the four industries cannot be passed over as past history which cannot now be corrected, for the Board persists in denying craft representation in the selected four in new cases that come before it" (Pet., p. 30).

See in this connection *Kaiser Aluminum and Chemical Corp.*, 119 NLRB 695, decided December 6, 1957.

The Court of Appeals also noted that Sec. 9(b)(2) of the Act does not order the Board to establish a craft bargaining unit whenever so requested by a qualified craft union. Indeed, Congress specifically rejected a proposal of the labor unions which would have required that result. The Court of Appeals further noted that this Court had previously ruled in *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 156, that the wishes of employees were not controlling in unit determinations (Pet. pp. 26-27).

And finally, the Court of Appeals rejected the Board's attempt to discriminate in favor of plantwide bargaining in the four selected industries while pretending to "lay down" in *American Potash* a general rule in favor of craft units in all other industries (Pet., p. 28).

ARGUMENT

The decision of the Court below was plainly correct; there is no conflict of decision; and in any event the failure of the interested union to comply with Sec. 9(h) of the Act requires affirmance of the judgment below so that the Court need not pass upon the question on which the petitioner seeks review.

I.

The Decision Below Is Manifestly Correct

The Board's authority to determine the appropriate bargaining unit in any case is derived from Section 9(b)

of the Act which requires it to "decide in each case" what unit will "assure to employees the fullest freedom in exercising the rights guaranteed by this Act." This Court decided in 1941 that although the wishes of employees are one of the factors to be considered, they do not control unit determinations. *Pittsburgh Plate Glass Co.* v. *NLRB*, *supra*, p. 8. Moreover in deciding whether to allow craft units in a given case, the Board itself has recognized that it must balance two conflicting considerations: (a) the maintaining of industrial peace through adherence to existing bargaining relationships and (b) the indulging of the desire of a group of craftsmen to be represented separately. Until its decision in *American Potash*, the Board considered various criteria in determining this issue, some of the more important of which were:[6] (a) the employer's history of bargaining; (b) the history, extent, and type of organization of employees in other plants of the employer and of other employers in the same industry; (c) the relationship between the proposed unit and the employer's method of managing and operating the plant; and (d) the maintenance by the group seeking separate representation of its identity as a craft group despite a history of bargaining on a more comprehensive basis. Had the Board applied these, its usual criteria, in the instant case, it would have denied the craft unit sought here. But instead the Board applied the automatic rule of *American Potash* that except for the four selected industries, craft units would be allowed however integrated the operations and whatever the history of bargaining in the plant or industry (B.A. 23-24).

The Board's ruling in *American Potash* was based on the misapprehension—which it repeats in the petition for certiorari (Pet., pp. 11-13)—that either it must allow craft units in all cases whenever requested by a craft

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[6] See *Hamilton & Sons*, 104 NLRB 627, 636.

union or that it must deny them in all cases. That dilemma, we submit, was and is of the Board's own creation. All the Board need do in any case, as suggested by the Court below (Pet., p. 29), is to apply the criteria it has itself evolved and decide "in each case" whether or not those criteria permit a craft unit.[7]

The Court below held that the Board's action in the instant case was arbitrary and discriminatory; that the Board may not discriminate between the steel, aluminum, lumber and wet milling industries on the one hand, and the plate glass industry, on the other, when the circum-

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[7] The Court below pointed out (Pet., p. 26, note 3) that during the Senate hearings on the bills that became the Taft-Hartley Act, representatives of labor unions urged that Sec. 9(b) be revised to make mandatory the establishment of craft units in all cases unless a majority of the craftsmen involved voted against separate representation. *Hearings before Senate Committee on Labor and Public Welfare on S. 55 etc., 80th Cong., 1st Sess.*, pp. 1007 et seq. (1947). Their proposal was not adopted. See also Senator Taft's explanation on the floor of the Senate that Section 9(b) does not "go the full way of giving them (the craftsmen) an absolute right in every case". 2 *Legislative History of Labor Management Relations Act* (1947), p. 1009. Thus, even though Congress, in enacting the Taft-Hartley Act, did facilitate the establishment of craft units, it did not require the Board to permit them automatically in all cases. Instead, it required the Board to make its unit determination "in each case" limited only by the requirement in Section 9(b)(2) that it not give controlling effect to any prior determination by the Board *against* craft units.

Despite the foregoing Petitioner persists, as the Court below pointed out (Pet., p. 27), in reading into the statute the labor union proposals mentioned above.

stances in all these industries are the same. (Pet., pp. 28-29). In order to act fairly and not arbitrarily, the Board must accord to the factors of integration and past bargaining history in the plate glass industry the same weight as it gives these factors in the four selected industries.

The Court of Appeals correctly pointed out that the Board has broad power and discretion to select the appropriate bargaining unit in each case and its "discretion . . . will not be disturbed unless it is arbitrarily and unreasonably exercised." *May Department Stores* v. *NLRB*, 326 U.S. 376, 380 . . ." (Pet., p. 27). And the Board may make distinctions based on rational grounds. But when the factors that move the Board in one set of industries to reach a conclusion denying craft units are present also in another industry, then the Board must deny such craft units in that other industry. Due process requires no less. *Yick Wo* v. *Hopkins*, 118 U.S. 356; *Wallace* v. *Currin*, 95 F. (2d) 856, 867 (C.A. 4) *aff'd* 306 U.S. 1; *Missouri Pacific R. Co.* v. *Mackey*, 127 U.S. 205, 209; *Pfeiffer Brewing Co.* v. *Bowles*, 146 F. (2d) 1006, 1007 (Emergency App. Ct.) *cert. den.* 324 U.S. 865; *Sims* v. *Rives*, 84 F. (2d) 871, 878 (App. D.C.) *cert. den.*, 298 U.S. 683; *NLRB* v. *Gene Compton's Corp.*, 262 F. (2d) 653, 655 (C.A. 9); *NLRB* v. *Plankinton Packing Co.*, 265 F. (2d) 638 (C.A. 7).[8]

The Board contended before the Court below and repeats its contention here that it had the power in *American Potash* on the basis of policy considerations to lay

[8] See also *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 585; *Currin* v. *Wallace*, 306 U.S. 1, 14; *Hirabayashi* v. *U.S.*, 320 U.S. 81, 100; *Bolling* v. *Sharpe*, 347 U.S. 497, 499. As these cases show, while the Fifth Amendment contains no equal protection clause, there may be discrimination of such an injurious character in the application of laws as to amount to a denial of due process.

down the *general rule* that craft units best serve the interests of employees. (Pet., pp. 9-11, 28). The difficulty with this argument is that in *American Potash* the Board did not lay down a *general rule*, because it created exceptions for the steel, aluminum, lumber and wet milling industries. As said in *Pfeiffer Brewing Co.* v. *Bowles*, *supra*, p. 11:

> "Class legislation discriminating against some and favoring others is prohibited. . . . the law must affect alike all persons in the same class and under similar conditions . . . classifications must embrace all who belong in the same category and may not be capricious or arbitrary."

As the Court below held (Pet., p. 28), the Board may not be arbitrary in the exercise of its functions to promulgate a policy applicable to any class of cases. This was strikingly shown, the Court added, in the decision of this Court in *Office Employees International Union* v. *NLRB*, 353 U.S. 313, where the Court held that the Board was without power on the basis of policy considerations to create an "arbitrary blanket exclusion" from its jurisdiction of union employers as a class, and that while it may decline jurisdiction on an *ad hoc* basis over nonprofit employers, it may not renounce jurisdiction over an entire category of employers. Likewise in *Hotel Employees* v. *Leedom*, 358 U.S. 99, this Court rejected the Board's renunciation of jurisdiction on the basis of policy considerations over the hotel industry as a class.

The Board also contended before the Court below, and repeats its contention here (Pet., pp. 14-15), that it was justified in not applying its *American Potash* rules to new plants in the four selected industries "in the interest of not disturbing existing bargaining patterns" and "in the interest of certainty and ease of administration." But these are not sufficient reasons to disregard the due process requirements of the Fifth Amendment. As the Court

below pointed out, the Board's "argument . . . defeats itself, for the pattern of plantwide bargaining in the plate glass industry is as firmly established as in any other and if it is disrupted by the automatic extension of craft union bargaining, the ensuing confusion and disturbance of industrial peace are as likely to occur as they would be in the industries which the Board protects" (Pet., pp. 29-30). In other words the Board's decisions on craft units must be identical where the facts are identical.

II

The Decision Below Is Correct In Any Event Because Respondent Was Under No Obligation To Bargain With The Electrical Workers On Account Of The Failure Of Its Local 307 To Comply With Sec. 9(h) Of The Act And Respondent Was Entitled To Show Such Lack Of Compliance In The Board Proceedings.

While the Court did not reach this issue, Respondent is of course free to urge any valid argument in support of the judgment below, including any contention not passed on by the Court below. *Langnes* v. *Green*, 282 U.S. 531, 535-539 and cases there cited.

1. Local 307 of the Electrical Workers was not in compliance with Sec. 9(h) of the Act. That local assisted in the organization of the employees in Respondent's plant, admits them to membership, and intends to serve them (*supra*, p. 6). Therefore, sec. 9(h) precluded the conduct of the representation proceeding that took place here and any certification resulting therefrom was a nullity. Respondent was thus relieved of any obligation to bargain with the Electrical Workers. *Brookings Plywood Corp.*, 100 NLRB 431; *U.S. Gypsum Co.*, 100 NLRB 1100; *International General Electric Co.*, 117 NLRB 1571; *Endicott Johnson Corp.*, 117 NLRB 1886; *Laundry Owners Ass'n*, 123 NLRB No. 77.

2. Compliance by Local 307 was litigable before the Board. *NLRB* v. *Coca-Cola Bottling Co.*, 350 U.S. 264, where this Court held specifically that during an unfair labor practice proceeding an employer may show that a union has not complied with Sec. 9(h) and thereby establish the Board's want of jurisdiction.[9] The *Coca-Cola* case squarely controls this one because here, as there, Respondent sought to prove that a particular person, who had not filed an affidavit, was an officer—indeed a constitutional officer—of the union required to file such affidavit (*supra*, p. 6).[10]

3. Nor can the Board defend its failure to allow Respondent to show that Local 307 was not in compliance on the ground that it had administratively determined that Local 307 was in compliance. Such administrative determination is insufficient, when challenged in an unfair labor practice proceeding. *NLRB* v. *Eastern Mass. St. Ry.*, 235 F. (2d) 700, 706-707 (C.A. 1), *cert. den.*, 352 U.S. 951.

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[9] See too *Leedom* v. *Mine Mill Union*, 352 U.S. 145, 148-149 where this Court, referring to its *Coca-Cola* decision and earlier decision in *NLRB* v. *Highland Park Mfg. Co.*, 341 U.S. 322, again affirmed that the Board lacked jurisdiction in unfair labor practice cases if the charging union was not in compliance with Sec. 9(h).

[10] Several U.S. Courts of Appeals have since had occasion to apply the teaching of the *Coca-Cola* decision. *NLRB* v. *Eastern Mass. St. Ry.*, 235 F. (2d) 700, 706-707 (C.A. 1), *cert. den.*, 352 U.S. 951; *NLRB* v. *Puerto Rico Food Products*, 232 F. (2d) 515 (C.A. 1); *Shoreline Enterprises* v. *NLRB*, 262 F. (2d) 933, 939-941 (C.A. 5); *NLRB* v. *Lannom Mfg. Co.*, 243 F. (2d) 304, 306 (C.A. 6), *cert. den.*, 355 U.S. 822; *Goodman Mfg. Co.* v. *NLRB*, 234 F. (2d) 775 (C.A. 7) *cert. den.*, 352 U.S. 872. There have been no judicial decisions to the contrary since the *Coca-Cola* decision was rendered.

4. The Board's refusal to allow Respondent to litigate the question of whether a particular individual was an "officer" of the local union within the meaning of Sec. 9(h) and hence required to file an affidavit, is inconsistent with the position it took in allowing litigation over the meaning of other terms used in Sec. 9(h), such as "labor organization" or "affiliate". *Monsanto Chemical Co.*, 119 NLRB No. 6. Since the Board's position is thus contrary to the law as laid down by this Court and inconsistent with its own position in other comparable situations, it is entitled to no weight.

In sum, the record is clear under Respondent's offer of proof, which stands uncontradicted, that a constitutional officer of Local 307 had failed to file the affidavit required by Section 9(h) of the Act, although compliance by such local was admittedly essential to the Board's jurisdiction. And, as the *Coca-Cola* case holds, Respondent was entitled to show that the person who failed to file the affidavit was indeed an officer of Local 307. It follows, under the decisions of this Court in *Highland Park*, *Coca-Cola* and *Mine Mill*, that since Local 307 was not in compliance, the Board was without jurisdiction to investigate the representation petition, hold a hearing thereon, direct an election, certify the Electrical Workers, or issue the complaint which eventuated in the order which the Court below refused to enforce.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

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APPENDIX

The provisions of the National Labor Relations Act involved here are as follows:

1. Section 8(a)(5) which provides that

> "It shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)."

2. Section 9(a) which provides in relevant part

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . ."

3. Section 9(b) which provides in relevant part

> "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not . . . . . (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation. . ."

4. Section 9(c)(1) which provides in relevant part

> "Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
>
> (A) by an employee or group of employees or any individual or labor organization acting in

their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) . . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

5. Section 9(h) which provides

"No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits." *

* While Section 9(h) was repealed by the Labor-Management Reporting and Disclosure Act of 1959, Public Law 86-257, 86th Cong., the repeal was not retroactive. *Du-Wel Decorative Co.*, 125

6. Section 10(b) which provides in relevant part

> "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect . . ."

NLRB No. 5 (Nov. 9, 1959); *Danville Silk Co.*, 45 LRRM 1128 (Nov. 27, 1959). Failure of a charging union, as here, to comply with Section 9(h) deprived the Board of jurisdiction to proceed in this case.